

Opinion No. 2012-128

January 17, 2013

The Honorable Henry H. Boyce  
Prosecuting Attorney  
Third Judicial District  
208 Main St., Suite 31  
Newport, Arkansas 72112

Dear Mr. Boyce:

You have requested my opinion on several questions concerning the Third Judicial District Drug Task Force (“DTF”). You state that you are “the head of the [DTF] and employ two field agents, a secretary and a project administrator.” You then ask:

1. Should a defendant’s civil rights be violated by DTF personnel, am I personally liable for the offender’s actions?
2. Am I immune from torts that could result from the clean-up of a toxic methamphetamine laboratory?
3. Am I immune from torts in my capacity as Drug Task Force director?
4. What effect would the purchase of liability insurance have on any immunity I have?

**RESPONSE**

I cannot definitively opine on these questions in the abstract because I cannot conceive of every possible legal action that might be brought under the attendant facts. Nor can I anticipate the acts or omissions that might be asserted as a basis of any liability. I can, however, explain some general legal principles that bear on your questions. With regard to your first question, to the extent a claimant

attempted to hold you vicariously liable for the acts of another person under either the federal Civil Rights Act or the Arkansas Civil Rights Act, such a claim would be without merit. It is well settled that the doctrine of respondeat superior cannot be a basis of liability under either of these acts. It also seems clear as a general matter that a civil rights action will not lie against you for failure to supervise or control your subordinates if you had no knowledge of or connection with their improper acts. It is my opinion in response to your second and third questions that the statutory immunity provided by A.C.A. § 19-10-305 will protect you from personal liability for your non-malicious acts or omissions. With regard to your final question, section 19-10-305 provides that state officers are “immune from liability and from suit, except to the extent that they may be covered by liability insurance.” Thus, if you purchase insurance, a plaintiff may be able to assert a claim against you in your individual capacity in state court that is not barred by statutory immunity. Such a plaintiff could, if liability was proven and damages awarded, recover up to the amount of the insurance coverage. Because it appears that such insurance coverage frequently does not cover an insured for malicious acts, the insurance might not be beneficial as sovereign immunity already covers you for suits in your official capacity and statutory immunity already covers you for suits in your individual capacity (unless you act with malice).

***Question 1 - Should a defendant’s civil rights be violated by DTF personnel, am I personally liable for the offender’s actions?***

The doctrine of respondeat superior is not a basis for liability under the federal Civil Rights Act, codified at 42 U.S.C. § 1983, or the Arkansas Civil Rights Act, codified at A.C.A. §§ 16-123-101–108.<sup>1</sup> Accordingly, to the extent a claimant attempted to hold you vicariously liable under either of these laws, such a claim would be without merit.<sup>2</sup>

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<sup>1</sup> See *Bolin v. Black*, 875 F.2d 1343, 1347 (8th Cir. 1989) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982)); *Jones v. Huckabee*, 369 Ark. 42, 49, 250 S.W.3d 241 (2007) (noting that the court may look to federal case law interpreting Section 1983 for guidance in construing the Arkansas Civil Rights Act, citing A.C.A. § 16-123-105(c)).

<sup>2</sup> As to any civil rights claims based on your own actions, qualified immunity will protect you from liability if you are sued under Section 1983, unless your conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (citation omitted). And a suit under the Arkansas Civil Rights Act is analyzed the same as a suit under Section 1983. See *Rainey v. Hartness*, 339 Ark. 293, 5 S.W.3d 410 (1999). The question of qualified immunity is a question of law to be determined from all of the existing facts and circumstances based on whether reasonable officers knew or should have known that

It seems clear, moreover, that a civil rights action will not lie against you for failure to supervise or control your subordinates if you had no knowledge of or connection with their improper acts. I believe this is apparent from the following summary of the general rules applicable in Section 1983 claims against supervisory law enforcement personnel:

[I]t appears that the Supreme Court has held that a § 1983 action will not lie against police supervisory officers for failure to prevent police misconduct, absent a showing of direct responsibility for the improper action. *See Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977). What is required is a causal connection between the misconduct complained of and the official sued. *See McClelland v. Facticeau*, 610 F.2d 693 (10th Cir. 1979). “Liability may be found only if there is personal involvement of the officer being sued.” *Watson v. Interstate Fire & Casualty Co.*, 611 F.2d 120, 123 (5th Cir. 1980).<sup>3</sup>

***Question 2 - Am I immune from torts that could result from the clean-up of a toxic methamphetamine laboratory?***

***Question 3 - Am I immune from torts in my capacity as Drug Task Force director?***

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their conduct violated constitutional law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As further explained by one of my predecessors:

Under the doctrine of qualified immunity, an individual is immune from trial if the actions complained of were taken in good faith in the performance of one’s duties, and the acts do not violate any clearly established constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The test for the applicability of qualified immunity turns upon the “objective legal reasonableness of the action,” assessed in light of legal rules that were “clearly established” at the time the action was taken. *See Anderson v. Creighton*, 483 U.S. 635 (1987). The immunity is “qualified” because it does not obtain where the activity is in violation of clearly established law that a reasonable person would have known. *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987); *Matthews v. Martin*, 280 Ark. 345, 658 S.W.2d 374 (1983).

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<sup>3</sup> *Harris v. Pirch*, *supra* n. 1, at 685. *See also Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986) (noting that a cause of action predicated on breach of a duty to supervise or control subordinates may be maintained only if the supervising officer “demonstrated deliberate indifference or tacit authorization of the offensive acts by failing to take remedial steps following notice of a pattern of such acts by his subordinates.”)

I will address these questions together because I assume Question 2 envisions the clean-up being conducted by the DTF you direct. In other words, like Question 3, Question 2 is asked with your role as DTF director in mind.

As a state officer, you cannot be held liable for non-malicious acts or omissions occurring within the course and scope of your employment:

Officers and employees of the State of Arkansas are immune from liability and from suit, except to the extent that they may be covered by liability insurance, for damages for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment.<sup>4</sup>

Although only a finder of fact could determine whether this immunity applied under the facts of a particular claim, it is my opinion as a general matter that the immunity granted by this statute extends to your acts or omissions as DTF director. As prosecuting attorney, you are specifically authorized to appoint deputies and other employees to serve the DTF:

A prosecuting attorney shall have the power to appoint deputy prosecuting attorneys and other employees at such salaries as are authorized in the grant awards from the Department of Finance and Administration’s Drug Law Enforcement Program, Anti-Drug Abuse Act of 1986, as amended, or its successor.<sup>5</sup>

As reflected by this statute, a drug task force’s operations are funded through grants under the federal Anti-Drug Abuse Act and state matching funds.<sup>6</sup> Although the position of drug task force director or administrator is not separately identified in the Arkansas Code, the above statute plainly envisions that a prosecuting attorney might direct this program that is funded in part by the state. The prosecutor’s potential role in this regard is further reinforced by a separate

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<sup>4</sup> A.C.A. § 19-10-305(a) Supp. 2011).

<sup>5</sup> A.C.A. § 16-21-147 (Repl. 1999).

<sup>6</sup> See *South Central Ark. Drug Task Force v. Ray*, 56 Ark. App. 30, 31-32, 937 S.W.2d 682 (1997) (discussing the South Central Arkansas Drug Task Force program).

statutory reference to “[m]embers of ... prosecuting attorneys’ drug task forces[.]”<sup>7</sup>

These provisions lead me to conclude that you are acting within the scope of your state employment when you direct the DTF.<sup>8</sup> Accordingly, I believe you will enjoy the immunity from tort liability afforded by A.C.A. § 19-10-305.<sup>9</sup>

***Question 4 - What effect would the purchase of liability insurance have on any immunity I have?***

Section 19-10-305 grants immunity from liability and suit to state officers and employees, “except to the extent that they may be covered by liability insurance.” The purchase of liability insurance will therefore create an exception from the immunity provided by this statute. In other words, if you purchase insurance, a plaintiff may be able to assert a claim against you in your individual capacity in state court that is not barred by statutory immunity. If liability was proven and damages awarded, the plaintiff asserting the claim could recover up to the amount of the insurance coverage.

It should perhaps be noted in this regard that such insurance might not be beneficial. Sovereign immunity<sup>10</sup> already covers you for suits in your official capacity and statutory immunity already covers you for suits in your individual capacity, unless you act with malice. And it appears that insurance coverage of this sort frequently does not cover an insured for malicious acts.

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<sup>7</sup> A.C.A. § 16-81-106(g)(13) (Supp. 2011) (addressing the arrest authority of certified law enforcement officers).

<sup>8</sup> *Accord South Central Arkansas Drug Task Force, supra* n. 6 (drug task force employee determined to be a state employee entitled to workers’ compensation benefits where prosecuting attorney directed the task force and employee’s position was funded through federal grants and state matching funds handled through the State Treasury).

<sup>9</sup> It perhaps also bears noting that you are cloaked with absolute immunity from suit under the common law when the acts complained of are committed within the scope of your prosecutorial duties. *See generally Culpepper v. Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990).

<sup>10</sup> Ark. Const. art. 5, § 20.

The Honorable Henry H. Boyce  
Pros. Att'y, 3<sup>rd</sup> Judicial District  
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Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion,  
which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

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